The WTO: Domestic Regulation and the Challenge of Shaping Trade

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I. Introduction

While business and trade policy focus on expanding commercial opportunities and making a profit both policies benefit from adherence to certain values and rules. American companies seek certain assurances when operating in foreign countries, including respect for the rule of law (honoring contracts, arbitration of disputes, objective legal systems, transparency (objective, uniform, predictable regulation), protection of intellectual property rights, and restraints on conduct that generates commercial uncertainty, such as corruption and nepotism. Without stable and predictable conditions, it is more difficult for U.S. companies to operate successfully. At the same time, the absence of the rule of law, or a weak and ineffective rule of law, limits a nation's economic opportunities by undermining its ability to attract investors or expand trade. As a result, the lack of an effective rule of law constrains a country's economic growth, reduces living standards, and significantly limits the opportunities afforded to its people.

Expanding the World Trade Organization's (WTO) traditional focus on tariff and non-tariff trade barriers to encompass a rule of law agenda would offer a classic win-win opportunity for U.S. trade policy, the WTO, and the citizens of impoverished developing countries. Such an initiative would expand trade and investment opportunities for U.S. companies, workers, farmers, and service providers, who stand to benefit from a strengthened rule of law that expands opportunities in markets around the world, while facilitating economic growth and higher living standards in poor developing countries. At the same time, the developing countries would benefit from increased trade, foreign direct investment, access to capital, and technology, while their people would gain from greater predictability and protection against abuses of government power, at least in the commercial arena and perhaps beyond.

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Such an approach also could offer a way to bridge the anti-globalization divide. In Seattle, Genoa, and Washington, D.C., protestors have challenged the role of multilateral economic institutions, such as the WTO, IMF, G-8, and World Bank. The extreme and sometimes violent character of the trade and globalization debate is unfortunate. While some of the concerns and criticisms of the anti-globalization protestors are legitimate, their claims that trade, the WTO, and economic globalization are bad for the world's poor and for human rights are demonstrably wrong. A rule of law initiative could offer tangible proof that U.S. trade policy and WTO negotiations can support long-term progress on issues closely tied to freedom, human rights, and democracy—values supported by all Americans.

There is abundant evidence that an open trading system goes hand-in-hand with progress toward democracy, economic freedom, and the rule of law. In Korea, Taiwan, Mexico, and Chile, trade liberalization and an empowered middle class have supported political and economic reforms, free elections, and vibrant democracy. In these countries, an open, growing, diversified free market economy supported progress toward democracy and the rule of law. In all regions of the world, economic liberalization, open trade, and market-oriented reforms have been accompanied by long-term progress toward democratic institutions and the rule of law.[1] Professor Seymour Martin Lipset described the relationship as follows:

> One of the most powerful factors that alters political beliefs and values and increases the prospects for stable democracy is socioeconomic development . . . Overwhelmingly, the weight of the evidence confirms a strong positive relationship between democracy and socioeconomic development and that this relationship is causal in at least one direction: *Higher levels of development generate a significantly higher probability of democracy and of stable democracy.*[2]

In contrast, closed and isolated economies, such as North Korea and Cuba, are often accompanied by significant abuses of human rights.

Market-oriented economic development appears to trigger far-reaching social changes that indirectly undermine authoritarian rule. These include enhanced educational opportunities driven by increased demand for trained managers and technicians, expanded access to information, the opening of society and culture to outside influences and ideas, the breakdown of concentrated economic power in the hands of the state or a narrow elite, and the emergence of an independent and entrepreneurial middle class. The latter development has profound long-term political implications. Authoritarian governments frequently draw power from a relatively narrow elite, such as the land-holding families of Latin America, or the Communist political cadres of former Soviet bloc. A well-educated, independent middle class that is not dependent on the state is thus more able to challenge authoritarian control. As Professor Lipset explains:

> Economic development also tends to alter the relationship between state and society, to increase the number and variety of independent organizations that check the state and broaden political participation, and to reduce corruption, nepotism, and state control over jobs and opportunities to accumulate wealth. Finally, economic development thrusts a country into ever

1. SEYMOUR MARTIN LIPSET, POLITICAL MAN (2d ed., Doubleday 1981) (1960); Henry S. Rowen, *The Short March: China's Road to Democracy*, The National Interest (Fall 1996); RONALD A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION (Yale Univ. Press 1971); Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, *in* 4 Julian J. Rothbaum Distinguished Lecture Series (1993).

2. LARRY DIAMOND ET AL., POLITICS IN DEVELOPING COUNTRIES: COMPARING EXPERIENCES WITH DEMOCRACY (2d ed., Lynne Rienner Publishers 1995).

> greater cultural and economic integration with a world whose most desired markets, capital, goods, technology, and ideas are controlled primarily by democracies.[3]

Dr. Henry Rowen, a Stanford professor and former Assistant Secretary of Defense in the Reagan administration, has charted the relationship between economic development and political freedom, showing a strong correlation between per capita income and freedom in Asia:[4]

> Growing wealth is accompanied by increased education, the building of business and government institutions with some autonomy, and the formation of attitudes that enable democratic governments to survive when they have a chance at power. Spain, Portugal, Chile and Argentina, in addition to Taiwan and Korea, all made the transition to democracy when they were within this [$5,000 to $6,000 per capita] income range.[5]

Economic development requires investment, capital equipment, worker training, infrastructure, education, technology, and functioning markets, but it also benefits from the rule of law and from political and judicial systems that promote stability, fairness, and transparency. As Professor Debora Spar of Harvard University put it:

> American firms' normal business procedures incorporate a sort of grassroots meritocracy and openness not found in many host-country companies. U.S. and Western multinationals reward employees based on performance, not out of patronage or other non-professional considerations. They tend to treat local unions respectfully, demonstrating to populations lacking in basic freedoms that representation and negotiation are concepts that can work. Multinationals emphasize training and workplace benefits, further reinforcing the idea that every individual has intrinsic potential and human dignity.[6]

This phenomenon reflects U.S. and European best managerial practices and corporate culture, but there is an even more compelling force at work. As a matter of self-interest, American and European businesses, like businesses everywhere, benefit from stable and predictable conditions, an effective rule of law, and effective checks and balances on government power.

Developing countries and ordinary working people also benefit. In a key study, Harvard Professors Jeffrey Sachs and Andrew Warner showed that developing countries with open economies grew by 4.5 percent per year in the 1970s and 1980s, while those with closed economies grew at an annual rate of 0.7 percent.[7] A growing body of economic literature also shows that corruption significantly impairs economic performance and lowers living standards in all regions of the world.[8] In a pathbreaking study of judicial systems and

3. *Id.*

4. Rowen, *supra* note 1, at 68.

5. *Id.* at 69.

6. MICHAEL NOVAK, BUSINESS AS A CALLING: WORK AND THE EXAMINED LIFE 160 (Free Press, 1996) (quoting Debora L. Spar).

7. Jeffrey D. Sachs & Andrew Warner, *Economic Reform and the Process of Global Integration*, 95 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 1 (1995); David Dollar & Aart Kraay, *Trade, Growth, and Poverty* 27, The World Bank (2001) ("The evidence from individual cases and from cross-country analysis supports the view that globalization leads to faster growth and poverty reduction in poor countries."); Jeffrey A. Frankel & David Romer, *Does Trade Cause Growth?* 89 AMER. ECON. REV. 379 (1999); Douglas A. Irwin & Marko Tervio, *Does Trade Raise Income? Evidence from the Twentieth Century*, 58 J. OF INT'L ECON. 1 (2002).

8. Marcos F. Gonçalves de Silva et al., *How Does Corruption Hurt Growth? Evidences about the Effects of Corruption on Factors Productivity and Per Capita Income*, EAES/FGV-SP's NPP ("The chief conclusion is that

economic performance, Robert Sherwood, Geoffrey Shepherd, and Celso Marcos de Souza concluded that weak, inadequate, or corrupt judicial systems constrain economic growth.[9]

An effective judicial system forces civic responsibility on all members of society, which provides a platform from which inter-personal relations with strangers can be undertaken with some confidence. Effective judicial arrangements offer every individual the opportunity to secure private rights and the expectation to have them sustained in the case of conflict or challenge, state interference, invasion, or other attacks. From the perspective of economic activity, impersonal commercial transactions have more prospect of flourishing.

In other words, as a developing country shifts from an economy based on personal relationships to modern commercial transactions, which require bringing together multiple independent actors, including foreign investors with access to capital or technology, legal reforms are required to protect long-term economic expectations and growth. Otherwise, there is a significant cost. Sherwood calculated that countries "suffer at least a 15% penalty in their growth momentum if their judicial systems are weak."[10] This preliminary estimate has been borne out by subsequent economic studies.

In a study for the World Bank, Professor Edwin Mansfield surveyed the impact of intellectual property rules on investment decisions by 100 major U.S. multinational corporations.[11] He found that foreign direct investment, particularly in advanced innovative technologies, is closely tied to effective intellectual property laws and enforcement:

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corruption negatively affects the wealth of a nation by reducing capital productivity, or its effectiveness") (Gonçalves et al. calculate that for eighty-one countries the average income per worker would increase 26 percent if corruption were reduced to the level of the top country on the scale—Denmark. For Brazil, income per Brazilian worker would increase by $5,208.21.); Engr. Zaheer Mirza, *Corruption of Non-Performance*, BUSINESS, Nov. 12, 2001, *available at* http://www.dawn.com/2001/11/12/ebr3.htm ("We may estimate the loss to [Pakistan's] national economy due to various categories of corruption. The first category of financial corruption is estimated to inflict a loss of about Rs100 billion per annum to the country."); Aymo Brunetti et al., *Institutions in Transition: Reliability of Rules and Economic Performance in Former Socialist Countries*, *at* http://www.worldbank.org/html/dec/publications/workpapers/wps1000series/wps1809/wps1809_abstract.html (last visited Aug. 22, 2003) ("The results suggest that differences in the degree of predictability of the institutional framework may indeed be an important factor in explaining differences in foreign direct investment as well as differences in economic growth across transitional economies."); Aminur Rahman et al., *Estimating the Effects of Corruption: Implications for Bangladesh, Corruption in Bangladesh: Costs and Cures*, The World Bank (2000) ("Thus, literally speaking, our results indicate that if Bangladesh were able to reduce corruption levels to those found in the more advanced East European countries (i.e. Poland or Hungary) holding other things constant, its corresponding annual average growth rate during 1990–97 could have been increased by between 1.65–2.14 percentage points. Achieving these rates of growth over the post-independence period would have resulted in per capita GNP of between US$524–587 (in 1995 constant $US) in 1997, compared to its actual per capita GNP of US$350."); T. M. Fitzpatrick & J. Kenison, *The Impact of Corruption on Foreign Direct Investment: Corruption Perceptions Index and Rates of Foreign Investment, available at* http://www.transparency.org (last visited Aug. 22, 2003) ("In every regression performed on Foreign Direct Investment where the CPI value was included as an independent variable the coefficient was found positive. This indicates that countries with lower levels of corruption (higher CPI scores) have a rate of Foreign Direct Investment that is higher as a percentage of Gross Domestic Product. This study now provides additional support to the findings of the Pablo Mauro study of 1995 that concluded that corruption and foreign direct investment are significantly correlated at the 10% p-value level.").

9. Robert M. Sherwood et al., *Judicial Systems and Economic Performance*, Working Paper, *available at* http://www.iris.umd.edu/news/conferences/tinker/tinjsep1.html (last visited Aug. 22, 2003).

10. *Id.*

11. Edwin Mansfield, *Intellectual Property Protection, Foreign Direct Investment, and Technology Transfer*, The World Bank (1994), *available at* http://www.wds.worldbank.org/servlet/wdscontactserver/WDSP/IB/1994/02/01/000009265_3970311123634/Rendered/PDF/multi_page.pdf (last visited Aug. 22, 2003).

> Taken at face value, a 10-point increase in our index seems to be associated with a decrease in U.S. direct investment in manufacturing of about $200 million per year. In interpreting this result, one should recognize that a country's system of intellectual property protection is inextricably bound up with its entire legal and social system and its attitudes toward private property.[12]

Professor Mansfield concludes that the "strength or weakness of a country's system of intellectual property protection seems to have a substantial effect, particularly in high-technology industries, on the kinds of technology transferred by many U.S. firms to that country."[13] The National Economic Research Associates (NERA) reached a similar conclusion, finding that countries with strong intellectual property systems experience higher rates of economic growth.[14] In other words, no multinational company is going to put innovative proprietary technologies—effectively its crown jewels—at risk in markets where intellectual property laws and enforcement are weak. As a result, countries with inadequate intellectual property and legal systems will experience difficulty moving up the global value chain from manufacturing and assembly of cheap labor-intensive products, such as textiles, apparel, and consumer goods, to advanced research, development, and production of innovative technologies, such as semiconductors, software, biotechnology, and pharmaceuticals. In effect, they will remain "developing" countries.

II. Making the WTO Negotiations into a Tool for Progress toward the Rule of Law

To date, most of the discussions about the rule of law in the WTO have focused on institutional reform of the WTO itself. Such reforms would strengthen the WTO's legitimacy and bolster public understanding of, and confidence in, its decision-making, particularly the dispute settlement system.[15] However, such measures, by themselves, would not directly address improved adherence to the rule of law by individual WTO Members.

The WTO, however, could easily become a tool for improving the rule of law around the world. This approach would require bringing rule of law issues into future trade negotiations, such as the Doha Round, which was launched in 2001 and is scheduled to finish in 2005. Various WTO Agreements already contain numerous "rule of law"-related obligations. As a result, the WTO Agreements incorporate many rule of law concepts, such as transparency, objective and impartial administration of laws, effective enforcement, judicial review, and rights of appeal. However, these issues have never been taken up in a systematic way, nor has there been any scrutiny of specific improvements in individual countries' legal, administrative, and regulatory systems and procedures. Instead, most WTO rule of law

12. *Id.*

13. *Id.*

14. Richard T. Rapp & Richard P. Rozek, *Benefits and Costs of Intellectual Property Protection*, New York: National Economic Research Associates, Inc, Working Paper 3, June 1990.

15. For example, WTO reforms have been proposed to improve the transparency of the dispute settlement process by opening hearings and arguments to the public, putting submissions on the public record, and allowing amicus briefs by non-governmental organizations. Reforms also have been proposed to democratize the WTO's negotiating processes, for example, by opening up the "Green Room" process in which potential compromises are initially explored among a select group of WTO Members. Such reforms would enhance the WTO's legitimacy. Nevertheless, the developing countries, particularly India, have resisted such reforms fiercely for reasons that are not readily apparent.

obligations apply narrowly to specific agreements or issues, such as publication of customs regulations, enforcement of intellectual property rights, and science-based food safety regulation.

If these obligations could be consolidated and clarified—"operationalized" in WTO/GATT parlance—and made specifically applicable to the legal and administrative systems of individual members, the WTO could become an important tool for strengthening the rule of law worldwide. Unlike some so-called new issues, such as competition and investment, the General Agreement on Tariffs and Trade (GATT), which entered into force in 1947 and is the WTO's predecessor institution, incorporates specific rule of law obligations. There can be *no* question that rule of law issues fall squarely within the WTO's competence and original mandate.

III. GATT Article X

The key GATT rule of law obligations are set out in article X, which provides:

Article X
Publication and Administration of Trade Regulations

1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing, inspection, exhibition, processing, mixing or other use, *shall be published promptly in such a manner as to enable governments and traders to become acquainted with them.* Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party shall also be published. The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.
2. *No measure of general application taken by any contracting party* effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor, *shall be enforced before such measure has been officially published.*
3. (a) Each contracting party shall *administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings* of the kind described in paragraph 1 of this article.
   (b) Each contracting party shall maintain, or institute as soon as practicable, *judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review and correction of administrative action* relating to customs matters. *Such tribunals or procedures shall be independent* of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; *Provided* that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.
   (c) The provisions of sub-paragraph (b) of this paragraph shall not require the elimination or substitution of procedures in force in the territory of a contracting party on the date of this Agreement which in fact provide for an objective and impartial review of administrative action even though such procedures are not fully or formally independent of the agencies entrusted with administrative enforcement. Any contracting party employ-

> ing such procedures shall, upon request, furnish the CONTRACTING PARTIES with full information thereon in order that they may determine whether such procedures conform to the requirements of this sub-paragraph.[16]

In short, GATT article X incorporates specific rule of law concepts and obligations, such as:

- *Transparency* of trade laws, regulations, and administrative and judicial decisions.
- *Prior notice* of trade-related measures.
- *Official publication* of trade measures prior to enforcement.
- *Uniform, impartial, and reasonable administration* of trade laws, regulations, decisions, and rulings.
- *Independent judicial, arbitral, or administrative review of trade decisions.*
- *Appeal procedures permitting prompt review and correction* of customs and trade decisions.

These obligations offer a foundation for future work toward improving adherence to the rule of law by WTO Members, strengthening legal systems, ensuring greater transparency and predictability in international commerce, and ultimately expanding trade and economic opportunity.

Unfortunately, article X is something of a stepchild in WTO/GATT jurisprudence. When GATT entered into force in 1947, it grandfathered the existing legal systems of GATT Contracting Parties. Paragraph 3(c) of article X provides: "The provisions of sub-paragraph (b) of this paragraph shall not require the elimination or substitution of procedures in force in the territory of a contracting party on the date of this Agreement which in fact provide for an objective and impartial review of administrative action even though such procedures are not fully or formally independent of the agencies entrusted with administration enforcement."[17] This grandfather provision was offset to a degree by a requirement that GATT Contracting Parties notify GATT of any deviations from the principle of objective independent judicial review "in order that they may determine whether such procedures conform to the requirements of this sub-paragraph."[18] However, the article X notification requirement has never been enforced, perhaps because the results would have been embarrassing to many governments.

As a result, GATT article X has long been viewed as weak and ineffective. While frequently cited in dispute settlement proceedings and complaints, GATT article X is typically an "add-on"—thrown in at the end of a long series of legal claims or findings that a protectionist measure violates more promising and enforceable WTO rules. Indeed, WTO and GATT panels typically refuse to rule on article X claims if a measure has already been found to violate another, more substantive GATT or WTO obligation:

> The Panel noted that the United States had, as a subsidiary matter, argued that Japan had also nullified or impaired benefits under Articles II, X:1, X:3 and XIII:3. In view of the findings set out in the paragraphs above [that the import quotas violated GATT Article XI], the Panel found it was not necessary for it to make a finding on these matters.[19]

16. The General Agreement on Tariffs and Trade (GATT 1947), art. X, *available at* http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm#articleX (last visited Aug. 22, 2003) (emphasis added).

17. *Id.*

18. *Id.*

19. Japanese Measures on Imports of Leather, May 15/16, 1984, GATT 31 B.I.S.D. 94, 114. *See also* Republic of Korea—Restrictions on Imports of Beef—Complaint by Australia, Nov. 7, 1989, GATT 36 B.I.S.D. 230,

Accordingly, unlike other GATT/WTO obligations, interpretations and elaborations of GATT article X has been limited. The main decision is *United States—Restrictions on Imports of Cotton and Man-Made Fibre Underwear*,[20] in which Costa Rica challenged U.S. import restrictions on underwear. After requesting bilateral consultations with Costa Rica under the WTO Agreement on Textiles and Apparel on March 27, 1995, the United States imposed safeguard restrictions on June 23, 1995, after the consultations failed to produce a mutually agreed solution. The import restrictions were made effective as of March 27, 1997—the date the U.S. requested consultations. The WTO Appellate Body upheld the panel's decision to strike down the U.S. cotton underwear safeguard as a violation of GATT article X. The decision stated the following:

> Article X:2, *General Agreement*, may be seen to embody a principle of fundamental importance—that of promoting full disclosure of governmental acts affecting Members and private persons and enterprises, whether of domestic or foreign nationality. The relevant policy principle is widely known as the principle of transparency and has obviously due process dimensions. The essential implication is that Members and other persons affected, or likely to be affected, by governmental measures imposing restraints, requirements and other burdens, should have a reasonable opportunity to acquire authentic information about such measures and accordingly to protect and adjust their activities or alternatively to seek modification of such measures. We believe that the Panel here gave to Article X:2, *General Agreement*, an interpretation that is appropriately protective of the basic principle there projected.[21]

The Appellate Body further concluded that the retroactive application of the U.S. safeguard, as of the date of the original request for consultations with Costa Rica, violated the due process rights of GATT article X:2, stating:

> At the same time, we are bound to observe that Article X:2 of the General Agreement, does not speak to, and hence does not resolve, the issue of permissibility of giving retroactive effect to a safeguard restraint measure. The presumption of prospective effect only does, of course, relate to the basic principles of transparency and due process, being grounded on, among other things, these principles. But prior publication is required for all measures falling within the scope of Article X:2, not just ATC safeguard restraint measures sought to be applied retroactively. Prior publication may be an autonomous condition for giving effect at all to a restraint measure. Where no authority exists to give retroactive effect to a restrictive governmental measure, that deficiency is not cured by publishing the measure sometime before its actual application. The necessary authorization is not supplied by Article X:2 of the General Agreement.[22]

Apart from *Cotton Underwear*, there are only a handful of GATT decisions interpreting its provisions and most are cryptic, involving only a few paragraphs or sentences. In *EEC—Restrictions on Imports of Apples*, it was determined that article X:1's prior publication requirement prohibits backdating of quotas. In this case, Chile complained about the EEC's restrictions on imported apples, which included a quota allocation administered through a restrictive licensing program in which the quota amount was not published until after the

267, 306, ¶¶ 108, 124, 130; Canada—Import Restrictions on Ice Cream and Yoghurt, Dec. 5, 1989, 36 B.I.S.D. 68, 92.

20. United States—Restrictions on Imports of Cotton and Man-Made Fibre Underwear, Feb. 10, 1997, WT/DS24/AB/R.

21. *Id.* at 6.3.

22. *Id* at 6.4.

start of the quota year. Thus, traders were required to enter imported apples without knowing the full amount of quota available. As in *Cotton Underwear*, the panel found the EEC measure to violate GATT article X, because it involved retroactive application of a quota:

> The Panel therefore considered that the allocation of back-dated quotas did not conform to the requirements of Article XIII:3(b) and (c). It also interpreted the requirements of Article X:1 as likewise prohibiting back-dated quotas. It therefore found that the EEC had been in breach of these requirements since it had given public notice of the quota allocation only about two months after the quota period had begun.[23]

IV. Rule of Law Obligations in WTO Agreements

In the Tokyo and Uruguay Rounds, several GATT/WTO Agreements were negotiated that dealt with rule of law concepts, such as transparency, objective and impartial decision-making processes, criminal and civil penalties, and rights of judicial review. These issues were taken up on a case-by-case basis, rather than any systemic or organized fashion. However, the various WTO Agreements, nevertheless, include useful concepts of fairness and procedural due process that could be incorporated in future trade agreements. For example:

A. General Agreement on Services (GATS)

GATS article VI (Domestic Regulation) builds on GATT article X. It includes the following provisions:

> Paragraph 1—All measures of general application affecting trade in services *must be administered in a reasonable, objective, and uniform manner.*
>
> Paragraph 2—Each WTO Member must establish *"judicial, arbitral, or administration tribunals" for prompt review of and appropriate remedies for administrative decisions affecting trade in services.* This provision is subject to a narrow exception for situations where such remedies would be inconsistent with a WTO Member's constitution or judicial system.
>
> Paragraph 3—*Applicants must be notified within a "reasonable period of time" regarding government regulatory decisions* involving applications for authorization to provide a regulated service.
>
> Paragraph 4—GATS Council shall aim to formulate disciplines to ensure that regulatory decisions regarding an applicant's qualifications to provide a service shall be (1) based on *"objective and transparent criteria"*; (2) not more burdensome than necessary to ensure the quality of the services; and (3) in the case of licensing procedures, not in themselves a restriction on the supply of a service.[24]

B. Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

Sections 2, 3, 4, and 5 of the TRIPS Agreement set out detailed obligations regarding civil proceedings provisional measures (such as injunctions), border enforcement, and criminal penalties for willful infringement. For example:

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23. European Economic Community—Restrictions on Imports of Apples, Complaint by the United States, June 22, 1989 36 B.I.S.D. 135, 166–67.

24. General Agreement on Trade in Services, art. VI, *available at* http://www.wto.org/english/docs_e/legal_e/26-gats.pdf (last visited Aug. 22, 2003) (emphasis added).

Section 2—Civil and Administrative Procedures and Remedies

Article 42—WTO Members shall provide *fair and equitable civil judicial procedures for enforcing intellectual property rights, including timely written notice, representation by independent legal counsel, right to substantiate claims and present all relevant evidence.*

Article 43—Judicial authorities shall have authority to order evidence within control of opposing party to be produced, and to impose sanctions for non-compliance, i.e., discovery.

Article 44—Judicial authorities shall be empowered to issue injunctions.

Article 45—Judicial authorities shall have the authority to order infringers to "pay the right holder *damages adequate to compensate for the injury* the right holder has suffered because of an infringement" and to order payment of expenses, including attorney's fees.

Article 46—Judicial authorities shall have the authority to order destruction or disposal of infringing merchandise.

Article 48—Judicial authorities shall have the authority to require persons who abuse enforcement procedures to provide adequate compensation for such abuse.

Section 3—Provisional Measures

Article 50 requires specific procedures for provisional measures, e.g., injunctions against infringing merchandise.

Section 5—Criminal Procedures

Article 61—WTO Members shall provide *criminal procedures and penalties* at least in cases involving willful trademark counterfeiting or copyright piracy on a commercial scale. Remedies shall include "imprisonment and/or monetary fines sufficient to provide a deterrent."[25]

C. Agreement on Technical Barriers to Trade (TBT)

The TBT sets out requirements for WTO Members when promulgating technical standards, such as product quality, safety, packaging, marking, and labeling requirements, and conformity assessment procedures for evaluating whether specific products comply with technical standards. While the TBT requires adoption of international standards where feasible and creates a rebuttable presumption that any measure, which is in accordance with the relevant international standard, does not create unnecessary barriers to trade in violation of the WTO, it also creates rules for situations where no international standard exists or a WTO Member's standard differs from the international standard. Some of these procedures are described below.

1. *Notice of Proposed Technical Standards*

WTO Members are required to publish notice of a proposed technical regulation at an early appropriate stage "in such a manner as to enable interested parties in other Members to become acquainted with it."[26] Thus, private parties, e.g., companies, must be given notice of a proposed technical regulation.

25. Agreement on Trade-Related Aspects of Intellectual Property Rights, Part III, §§ 2–5, *available at* http://www.wto.org/english/docs_e/legal_e/27-trips.pdf(last visited Aug. 22, 2003) (emphasis added).

26. Agreement on Technical Barriers to Trade, art. II, ¶ 2.9.1, *available at* http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf (last visited Aug. 22, 2003).

Timely notice of a proposed technical regulation must also be given to other WTO Members at an early appropriate stage, which is defined as a point "when amendments can still be introduced and comments taken into account."[27]

WTO Members must provide a "reasonable time" for other WTO Members to file comments in writing, discuss the comments upon request, and "take these written comments and the results of these discussions into account" in formulating a final standard.[28]

2. *Notice and Comment for Conformity Assessment Procedures*

Similar notice and comment requirements apply to the formulation of conformity assessment procedures for evaluating whether a product complies with a technical standard.

3. *Notice and Comment by Local Governments and Private Standard-Setting Bodies*

Since the responsibility of formulating technical standards is often delegated by the federal government to local authorities or to private entities, WTO notice and comment requirements are made effective for local governments and non-governmental standardizing bodies through article 4.1, which requires WTO Members to take reasonably available steps to ensure that such local and private entities comply with a "Code of Good Practice for the Preparation, Adoption and Application of Standards."[29] The Code requires a minimum sixty-day period for interested parties of other WTO Members to file comments on a proposed standard or conformity assessment procedure, and publication of timely and effective notice of the opportunity for comment prior to the start of the comment period.

D. Basic Telecommunications Agreement

The GATS Annex on Telecommunications provides specific obligations regarding basic telecommunications services, including: (1) transparency of conditions for access to telecommunications networks and services, specifications of technical interfaces, standards-setting bodies affecting for standards affecting access and notifications, regulations, and licensing requirements; and (2) reasonable and non-discriminatory terms and conditions for access to public telecommunications transportation networks. The Basic Telecommunications Agreement incorporates a "Reference Paper" spelling out good regulatory practices, including: (1) competitive safeguards to prevent anti-competitive practices by major suppliers; (2) inter-connection rights, allowing foreign providers to link up to domestic telecommunications network under transparent, non-discriminatory terms, conditions, and procedures; (3) dispute settlement regarding interconnection disputes by an independent domestic body; and (4) public availability of licensing criteria. Importantly, the Reference Paper requires that administration be an independent body: "The regulatory body is separate from, and not accountable to, any supplier of basic telecommunications services. The decisions of and the procedures used by regulators shall be impartial with respect to all market participants."[30]

27. *Id.* ¶ 2.9.2.
28. *Id.* ¶ 2.9.4.
29. *Id.* annex 3.
30. Telecommunications Services: Reference Paper (Apr. 24, 1996), *available at* http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

E. Government Procurement Agreement

Finally, the Government Procurement Code seeks to open up government contracts for goods and services through "transparency of laws, regulations, procedures and practices regarding government procurement."[31] It incorporates specific obligations regarding: (1) tendering procedures; (2) qualification of suppliers; (3) timely publication of any conditions for participation; (4) publication of invitations for participation in proposed procurements; (5) "fair and non-discriminatory" selection procedures; (6) adequate time limits and deadlines; (7) submission, receipt, and opening of tenders "under procedures and conditions guaranteeing the regularity of the openings"; (8) contracts must be awarded to the entity determined to be "fully capable of undertaking the contract" and which is either the lowest bidder or offers the "most advantageous" tender; and (9) transparency of terms and conditions.[32] Importantly, article XX of the Code requires that each Member establish "challenge procedures" providing non-discriminatory, timely, transparent, and effective procedures for losing suppliers to challenge alleged breaches of the agreement. Such challenges must be heard by a "court or by an impartial and independent review body with no interest in the outcome of the procurement and the members of which are secure from external influence." Any review body must incorporate key elements of judicial procedure, including representation of participants, access to the proceeding, issuance of written decision or opinions, and the right to present witnesses and submit documents. Such review bodies must be empowered to issue rapid interim relief to preserve commercial opportunities, such as through a preliminary injunction, and to correct breaches of the Agreement or to order compensation for losses or damages suffered.

V. U.S.-Japan Deregulation and Structural Reform Negotiations

To date, the best precedent for a rule of law negotiation is the prolonged campaign by the United States to secure greater transparency, judicial review, and improved administrative procedures in Japan. While U.S. trade negotiators initially focused on eliminating protectionist Japanese tariffs and quotas, it quickly became apparent that the formal, obvious barriers were not the principal obstacle to United States goods and services. Instead, U.S. exports were excluded by a host of informal and obscure exclusionary business practices, rooted in Japanese culture and the *Keiretsu* system, and often aided and abetted by Japanese Ministries with close ties to regulated industries under their jurisdiction. Thus, beginning in 1985, with the Market-Oriented Sector-Selective (MOSS)[33] talks, the U.S. began seeking Japanese commitments to simplify and clarify administrative procedures, particularly in the telecommunications, forest products, electronics, and pharmaceuticals and medical devices sectors (Med-Pharm). The aim was to improve market access for U.S. goods and services through a more transparent, non-discriminatory, and rule-based Japanese regulatory system. For example, the 1985 MOSS Med-Pharm Agreement stated (emphasis added):

31. Agreement Establishing the World Trade Organization, Annex 4(b), *Agreement on Government Procurement*, *available at* http://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf (last visited Aug. 22, 2003).

32. *Id.*

33. Despite an unfortunate choice of name, MOSS continues to this day while many U.S.-Japan initiatives have fallen by the wayside.

> The Japanese side responded that the Japanese regulatory system neither overtly nor covertly discriminated against foreign firms in favor of domestic ones, providing both with equal opportunities to enter the health care market. *It recognized, however, the importance of simplifying administrative procedures, eliminating administrative delays, and increasing transparency, for further facilitating access to Japan's market and strengthening the free trade system.* The Japanese side agreed to discuss and seek solutions to the issues as presented in this way.[34]

To this end, Japan committed, under MOSS, to reform specific elements of its health care regulatory system relating, for example, to testing and test data for new product approvals, foreign clinical data, approval and licensing processes, linkages between product approval (shonin) and the setting of reimbursement prices under the National Health Insurance (NHI) system, and the reimbursement pricing system itself. These highly specific and sectoral Japanese commitments were designed to streamline the approval and pricing of U.S. medical devices and pharmaceuticals, and thus to expand market access in a sector in which the United States is a world leader.

The MOSS Med-Pharm Agreement also tried to address the "transparency" of Japan's regulatory procedures. Building on a pledge by then Japanese Prime Minister Nakasone to "increase transparency in all regulatory bodies," the Agreement set out a series of Japanese transparency commitments.[35] The Med-Pharm Agreement, for example, required the Central Pharmaceutical Affairs Council (Chuikyo), an advisory body responsible for providing scientific advice to the Ministry of Health and Welfare on medical and drug product approvals, to make its "Common Instructions" public and hold meetings to explain them.[36] It provided that foreign applicants for new drug approvals would be permitted to hear instructions from CPAC members, ask questions, and comment on the Council's instruction. Foreign as well as domestic industries would be permitted to provide views to the Chuikyo, regarding reimbursement policy issues when changes to the NHI drug pricing rules or medical fee schedule were being considered.

The U.S. goal was to open up the "black box" of MHW's pricing and reimbursement decision-making and rule-making processes to American health care companies. Such transparency is important in a universal health care system like Japan, where access to the NHI's reimbursement schedule effectively determines market access for U.S. medicines and devices. In effect, the MOSS Agreement shows how general commitments to administrative simplification and transparency over time can be translated into specific incremental regulatory reform commitments that address key procedures and administrative processes for particular products.

In 1989, the Bush administration launched a follow-on "Structural Impediments Initiative" (SII) aimed at identifying and solving structural barriers in both the U.S. and Japanese economies that impeded trade and balance of payments adjustment. While SII focused on a broad range of macroeconomic barriers, several were noteworthy from a rule of law perspective.

First, the SII Agreement contains specific commitments to improve enforcement of Japan's Anti-Monopoly Act (AMA), by increasing the budget and staffing of the Fair Trade

34. Report on Medical Equipment and Pharmaceuticals Market-Oriented, Sector-Selective (MOSS) Discussions by the U.S. and Japan (MOSS) Negotiating Teams (Jan. 9, 1986), *available at* http://185.106/tcc/data/commerce_html/TCC_documents/Japan. . ./Japan_MOSS.htm.

35. *Id.*

36. *Id.* at 14.

Commission (JFTC). These commitments focused on beefing up the JFTC's investigative functions and ability to collect proof of illegal activities, increasing its reliance on formal enforcement actions (as opposed to informal and non-transparent guidance or exhortations), increasing the use of criminal penalties, and studying whether the AMA's damage remedy system was sufficient to deter anticompetitive conduct, bid-rigging, and cartels. While Japan's antitrust enforcement remains notoriously weak and ineffective, the SII Agreement at least began a long-term process of reform which has already somewhat strengthened the FTC's capabilities and has the potential to do more, particularly since the Koizumi administration now appears to agree that cartels and anticompetitive practices are an impediment to Japan's competitiveness and a sustained economic recovery.

Second, the SII Agreement sought to limit the use of informal bureaucratic procedures and practices, which seriously handicapped foreign firms and contributed to discriminatory government regulations. Thus, with respect to the practice of Japanese Ministries relying on informal "administrative guidance," the SII Agreement provides:

> The Government of Japan will implement its administrative guidance in writing as much as possible. It will make administrative guidance public when it is implemented, unless there are strong reasons not to do so, for example, when it is related to national security or when a publication of the administrative guidance causes, or may cause, such harm as might result from divulgence of trade secrets.[37]

Similarly, SII sought to open up the Japanese government's advisory and study group processes. In Japan, major policy and rule changes are frequently developed and drafted by advisory committees composed of academics, ministry officials, and industry representatives, who together prepare recommendations for the ministry or review proposals developed by the ministry staff. The lack of transparency of the advisory group processes and exclusionary membership of the key committees and study groups often contributed to the collusive drafting of protectionist or exclusionary government standards and regulations. By limiting membership to ministry bureaucrats and Japanese industry representatives, the advisory committee or "Bukai" process effectively excluded the views of foreign producers, putting them at a competitive disadvantage, and sometimes resulting in outrageously protectionist or discriminatory regulations.

Accordingly, the SII Agreement provided that the results of advisory committee and study group processes: (1) shall be made public, (2) shall invite members who can represent consumers if the discussions relate to consumer interests, (3) hear the opinions of foreigners or foreign industry representatives, and (4) shall not result in barriers to trade. While the SII reforms were somewhat vague and lacking in specificity, they represented a first step towards reform of the government advisory committee process, which continues to this day.

Many of the unilateral U.S. trade tools used in the 1980s to pry open the Japanese market have fallen by the wayside, but the United States and Japan have continued to pursue structural reform, de-regulation, and transparency. In 1997, after a brief flirtation with "manage trade" under the U.S.-Japan Framework Agreement, the Clinton administration resumed work on structural issues under the Enhanced De-Regulation and Competition Policy Initiative (EDI), at the Denver G-8 Economic Summit. The Enhanced

37. SII Agreement, at IV-8.

De-Regulation Initiative built on the SII and MOSS, while incorporating a more concrete, sectoral focus.

Under EDI, the U.S. and Japanese negotiators summarized the progress in each of the various sectors in an annual report, which was made public at the bilateral meeting of the U.S. President and Japanese Prime Minister at the G-8 Economic Summit. At the Birmingham G-8 Economic Summit, the Japanese Government made the following commitment:

> In order to ensure the transparency in the consideration of health care policies, . . . allow foreign pharmaceutical and medical device manufacturers meaningful opportunities to state their opinions in the relevant [Advisory] councils on an equal basis with Japanese manufacturers, and provide them on their request with opportunities to exchange views with MHW officials at all levels.

Accordingly, the Birmingham Agreement committed the Ministry of Health and Welfare[38] to: (1) transparency, (2) meaningful consultation with U.S. industry stakeholders on an equal basis with Japanese industry, and (3) an opportunity for U.S. industry to exchange views with officials at all levels of the ministry. While Japan did not take the final step of allowing U.S. companies to be represented on Chuikyo and other advisory groups, Birmingham did have the effect of greatly expanding opportunities for U.S. companies to participate in the formulation of Japanese health policy, to understand potential reforms being considered by the ministry and Chuikyo, and to engage in genuine dialogue with key Japanese bureaucrats. In addition, the MHW took the further step of establishing a Pharmaceutical Study Group, consisting of three domestic and foreign trade associations—the Federation of Japanese Pharmaceutical Manufacturers (FPMAJ), European Business Council, and Pharmaceutical Research and Manufacturers of American (PhRMA)—to discuss drug pricing policy and potential pricing rule changes. The result was a productive industry dialogue that broadly represented the views of innovative domestic and foreign companies.

In the Birmingham Agreement, Japan committed to consider "public comment procedures for the introduction, amendment, and abolition of regulations,"[39] roughly analogous to U.S. notice and comment rulemaking procedures under the Administrative Procedures Act. In March 1999, the Japanese cabinet adopted Public Comment Procedures for Formulating, Amending, or Repealing a Regulation.

In the *First Report to the Leaders on the U.S.-Japan Regulatory Reform and Competition Policy Initiative*, Japan stated that it had adopted a "Law Concerning Access to Information Held by Independent Administrative Institutions, etc.," which provided the right to request disclosure of information held by independent administrative institutions, public corporations, and required public corporations to inform the public of their activities.[40] This was effectively a Japanese version of the U.S. Freedom of Information Act (FOIA).

38. The Ministry of Health and Welfare has now been renamed the "Ministry of Health, Labor, and Welfare" as a result of a major reorganization of the Japanese government, which led to the merger of various ministries.

39. First Joint Status Report on the U.S.-Japan Enhanced Initiative on Deregulation and Competition Policy, Section H—Transparency and Other Government Practices (May 15, 1998), *available at* http://www.ustr.gov/releases/1998/05/status.pdf.

40. First Report to the Leaders on the U.S.-Japan Regulatory Reform and Competition Policy Initiative, Section VII, Transparency and Other Government Practices, Paragraph C (June 25, 2002), *available at* http://www.ustr.gov/regions/japan/2002-06_25_report_to_leaders.pdf.

While most U.S. administrations typically seek to differentiate themselves from the misbegotten policies of their predecessors, the Bush administration continued the EDI and SII approach under the new rubric of the "U.S.-Japan Regulatory Reform and Competition Initiative,"[41] and retained many of the key elements of previous de-regulation efforts, such as annual reports to the president and prime minister, sectoral working groups, and focus on de-regulation and structural reform.

The MOSS, SII, EDI, and RRCI have been useful and have contributed to progress on transparency and administrative reform. None of these initiatives have been a "silver bullet," which would solve, for all time, longstanding U.S. frustrations regarding Japanese market access barriers. The U.S. sectors covered by Japanese structural reform commitments, such as pharmaceuticals, medical devices, telecommunications, and financial services have done quite well in Japan, but progress has required intensive ongoing negotiations for over a decade and painstaking attention to changing specific Japanese rules, regulations, guidelines, and procedures. Japan remains a difficult and frustrating place to do business for American companies, but it would be an even more frustrating and intractable market if there was not a MOSS, SII, EDI, or RRCI.

VI. WTO Rule of Law Negotiations

The Doha WTO Round already represents an enormous commercial opportunity for the United States. Expanding the WTO agenda to cover rule of law issues would not just advance U.S. values, but also the interests of America's businesses, workers, and farmers in open, stable, and predictable access to foreign markets. The Doha Round provides an opportunity to build a WTO consensus on principles of legal conduct, transparency, and due process, and for locking in specific commitments to honor these principles in all WTO agreements, now and in the future. This would not require much, if anything, from the United States, since a firm commitment to the rule of law already stands as the foundation of America's entire legal and administrative system.

It is clearly in the interest of our trading partners to embrace these principles, but our farmers, manufacturers, financial service companies, high tech innovators, and workers in all industries will also benefit from the adoption of these sound legal principles and regulatory best practices by other countries. Such reforms would offer safeguards against protectionist or discriminatory actions in markets where governments traditionally have been allowed to run amok.

The WTO's present obligations with respect to transparency, regulatory notice and comment procedures, and judicial review currently are scattered through various agreements. Most are specifically limited to traditional trade matters, such as customs classification and valuation. While rule of law issues are sometimes discussed, the WTO's structure of separate negotiating groups has prevented a comprehensive solution. Instead of this scattershot approach, the WTO should launch a single set of negotiations that cover all rule of law issues in a comprehensive way. The aim would be to clarify, strengthen, and make more effective the obligations already set out in GATT article X.

In addition, the scope of such obligations should be clarified and expanded to cover all laws, regulations, and administrative and regulatory procedures that affect international

41. *Id.*

trade and market access for goods, services, agricultural products, intellectual property, and other sectors covered by WTO Agreements. Finally, core rule of law requirements could be fashioned, including some or all of the following:

- *Transparency* of laws, regulations, administrative and judicial decisions.
- *Prior notice* of trade-related measures.
- *Notice and comment procedures* for trade-related administrative and regulatory procedures and decisions, including transparent, non-discriminatory, meaningful, and good faith opportunities for foreign stakeholders to submit comments, participate in hearings and official and quasi-official advisory groups, and provide their views on regulatory matters affecting their interests in such a way that their views will be heard.
- *Official publication* of trade-related measures prior to enforcement.
- *Uniform, impartial, and reasonable administration* of trade-related laws, regulations, decisions, and rulings.
- *Access to information.*
- *Transparent administrative procedures.*
- Some level of minimum *due process*, e.g., right to submit evidence, right to counsel, access to information, right to a public hearings, and written decisions with sufficient detail to permit effective appellate review.
- *Independent judicial, arbitral, or administrative review of trade-related decisions.*
- *Appeal procedures permitting prompt review and correction* of trade-related decisions, including review by an independent and objective judicial, arbitral, or administrative body.

Such core obligations could operate as a minimum floor for all WTO Members, establishing a worldwide baseline for adherence to the rule of law. While such an approach would be incremental and would not lead to overnight change, it would commence a long-term process of improving legal systems in WTO Members. Of course, sustaining such progress would also require capacity-building and financial and technical assistance for the developing countries.

In fashioning a rule of law agreement, the WTO must avoid an impractical a one-size-fits-all approach. A level of obligation that works for advanced industrialized countries, like the United States and the European Union, may not be feasible for an impoverished developing country with a grossly inadequate legal system. Moreover, the world has a host of different legal traditions, including common law and civil law, which have resulted in very different legal systems in the United States, Continental Europe, Latin America, and Asia. Adopting a single standard for all countries and across all legal systems could produce a lowest common denominator that turns out to be very low indeed.

There is a solution. While setting minimum baseline standards regarding transparency, objective and impartial decision-making, and a right to independent judicial review that would operate as a commitment floor for all WTO Members, the WTO simultaneously should initiate Doha Round negotiations in which countries would enter into individual commitments regarding specific rule of law issues (similar to the approach already employed by the WTO tariff, services market access, and agricultural subsidy and market access negotiations). These commitments would be set out in each WTO Member's schedule of commitments. This approach would permit an outcome tailored to the circumstances and level of development of each country. For example, if a country's trading partners believe that the country requires excessive regulatory red tape and does not provide effective appeal rights for investors, improvements could be negotiated and set out in a schedule. If a

country's trading partners think that a WTO Member's failure to enforce its labor or environmental laws represents an indirect subsidy to its industries, they could seek to negotiate specific commitments to improve such enforcement.

Such an approach would also permit a greater degree of flexibility, while facilitating horse-trading on specific points of concern about a member's legal system. For example, even if the WTO does not launch broad competition and investment negotiations at the Mexico Ministerial, specific competition and investment issues in individual WTO Members could nevertheless be brought into the negotiations through specific commitments in a country's schedule. This would allow the WTO to address, for example, improved investment protections against expropriations of foreign property and improved antitrust enforcement.

Finally, the WTO would be wise to limit the scope of dispute settlement review of rule of law obligations to systemic issues, as opposed to the outcome of specific legal disputes. The WTO dispute settlement process would be inundated if it were to become the final global court of appeal for each and every judicial or administrative decision in each of its 142 Members. Instead, WTO dispute settlement should focus on systemic failures or deficiencies that reflect broad weaknesses in a WTO Member's legal or administrative procedures, as opposed to becoming a final court of appeal for specific judicial or administrative decisions.

The upside for the United States of a WTO Agreement on the Rule of Law would be substantial. Many of America's most competitive industries face regulatory barriers around the world. The most innovative U.S. industries—high technology, telecommunications, financial services, pharmaceuticals-medical devices, and biotechnology—are also among the most highly-regulated and often must overcome extensive regulatory and licensing hurdles before new products are allowed on the market. American companies often seek to establish a direct commercial presence in overseas markets in order to serve their customers, but encounter government restrictions on foreign direct investment. America's highly competitive farmers are the world's leading targets of disguised regulatory and food safety barriers. Finally, the Foreign Corrupt Practices Act prevents U.S. companies from cutting regulatory and legal corners—unlike some of their foreign competitors. A more open, transparent, rule-based, global operating environment stands to benefit the United States and helps U.S. companies access new markets and introduce innovative new products without excessive red tape and delays.

A WTO rule of law negotiation would not be a panacea. The negotiations would necessarily be incremental, and initial commitments from many WTO Members likely would be limited. Countries with weak legal systems or a tradition of corruption would resist expanding the WTO agenda. The developing world should understand by now that it too will benefit from improvements in the rule of law, since shortcomings in that area are a major impediment to attracting foreign direct investment. However, the developing countries have been among the strongest opponents of increased transparency in the WTO dispute settlement process. Finally, there will be naysayers, since these negotiations would probably focus more on commercial issues than on topics such as human rights. However, freedoms, once achieved, are very difficult to remove, and transparency is an effective antidote to government abuse. Once rule of law principles are adopted in a commercial setting, it is a short step to adopting them far more broadly—in the human rights arena and elsewhere. Governments that agree to transparency, due process, and judicial review for commercial matters may attempt to withhold such rights elsewhere in society, but this will turn out to be a losing proposition.

For the better part of a century, America has helped build an open rules-based global trading system. With U.S. leadership, the trade agenda has been expanded beyond customs and tariffs to non-tariff barriers, services, intellectual property, agriculture, and food safety. As the world's preeminent superpower, the United States needs a strong rules-based multilateral system that brings together, *not* divides, Europe, North America, Latin America, Asia, and Africa. A comprehensive WTO agreement involving more than 130 countries is the most efficient way to leverage access to our market, gain greater access to a worldwide marketplace in which more than 90 percent of our potential customers live outside the United States, and ensure that trade remains an engine for global growth and prosperity.

Trade has long expressed America's fundamental goals and values in a pragmatic way. As President Reagan said: "In dealing with our economy, more is in question than just prosperity. The United States took the lead after World War II in creating an international trading and financial system that limited government's ability to disrupt trade. We did this because history taught us the freer the flow of trade across borders, the greater the world economic progress and the greater the impetus for world peace."[42] Every American wants to see progress on the rule of law and human rights. It is important for the United States to continue to take the lead in fashioning a bold and ambitious WTO agenda, which addresses both America's commercial priorities and our deeply held values.

42. Business Coalition, *China PNTR: Advancing American Values* (Apr. 26, 2000), *available at* http://www.uschina.org/public/wto/usavalues.html.